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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of:

Review of the Pioneer's
Preference Rules

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ET Docket No. 93-266

REPLY OF SATELLITE CD RADIO, INC.

Satellite CD Radio, Inc. (CD Radio), by its attorneys, hereby replies to the comments filed on the Commission's *Notice of Proposed Rulemaking (NPRM)* in the above captioned docket.¹ CD Radio submits that the existing record does not support the proposed repeal of the rules: the reasons given in the *NPRM* were inadequate and the overwhelming number of commenters favor retaining the preference policy. Rather, logic -- and the comments already filed -- support retaining pioneer's preferences so as to reward regulatory pioneers that persuade the Commission to allocate and assign spectrum for new communications services.

¹ FCC 93-477 (Oct. 21, 1993).

I. ARGUMENT

In its Comments, CD Radio observed that the repeal of a rule required the same justification as its adoption, *i.e.*, that the public interest supported deleting the policy.² CD Radio also noted that the *NPRM* failed to provide any such basis for deletion, because of two fatal flaws in its argument. First, the *NPRM* erroneously quoted early drafts of the auction legislation as permitting deletion of the policy, when the final law appears to encourage continued grant of pioneer's preferences.³ Second, the *NPRM* mistakenly concludes that auctions -- which were designed to speed FCC licensing -- would provide private parties with sufficient incentives to conceive and press for changes in the allocation of spectrum necessary to create new services.⁴ CD Radio concluded,⁵ therefore, that the *NPRM* failed to articulate a lawful basis for deleting a

² Comments of Satellite CD Radio at 9 & n.22 (citing *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

³ Indeed, the legislative history of the final language adopted characterizes the pioneer's preference policy as "[c]onsistent with the FCC's statutory obligation [to promote] . . . a new telecommunications service or technology." Senate Budget Committee Print 103-36, "Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget," Title IV (June 16, 1993). This hardly seems like an invitation to delete the rule.

⁴ In so doing, the *NPRM* ignored statements the Commission made throughout the process of adopting its pioneer's preference. *E.g.*, Pioneer's Preference Reconsideration, 7 F.C.C. Rcd 1808, 1808 (1992) ("The pioneer's preference rules provide preferential treatment in the Commission's licensing process for parties requesting spectrum allocation rule changes associated with the development of new communications services and technologies."), *recon. denied*, 8 F.C.C. Rcd 1659 (1993) ("Second Reconsideration Order"). For this reason, Digital Satellite Broadcasting Corporation's (DSBC) claims that pioneer's preferences were tied to the volume of applicants in a lottery, Comments of DSBC at 2, is wrong.

⁵ See Comments of CD Radio at 13.

rule that the Commission just eight months ago characterized as providing "strong public interest benefits."⁶

Nor do the comments on the *NPRM* support the agency's position. The overwhelming majority of pleadings argued for retention of the preference policy. Commenters identified not only the policy's encouragement of innovation to the benefit of the public,⁷ but also the need to offset the expense and difficulty of obtaining a new spectrum allocation and service rules.⁸ In addition, commenters agreed with CD Radio that the agency misquoted the relevant Congressional language and that the new auction law does not compel repeal of pioneer's preferences.⁹

CD Radio reiterates that the agency should focus pioneer preferences on regulatory trailblazing, rather than on technical innovation alone. True pioneers are entities that conceive new services, select the appropriate spectrum, and work with the Commission to obtain the necessary allocation. Wall Street, however, will penalize

⁶ Second Reconsideration Order, 8 F.C.C. Rcd at 1659. In addition, the Commission recently has rejected arguments that the policy violates the *Ashbacker* doctrine. Compare Comments of DSBC at 3 with Second Reconsideration Order, 8 F.C.C. Rcd at 1659, 1661.

⁷ See Comments of Montgomery Securities at 1; Comments of Arraycomm at 5-6; Comments of PCNS-NY at 1; Comments of Cablevision Systems at 3-6; Comments of Panhandle Telephone Cooperative at 4; Comments of the Appellant Parties at 5; Comments of Advanced Mobile Technologies/Digital Spread Spectrum Technologies at 7-11; Comments of Pacific Bell and Nevada Bell at 1; Comments of Qualcomm at 3.

⁸ See Comments of PCN America at 5-6; Comments of PCNS-NY at 1-2; Comments of In-Flight Phone at 5; Comments of Omnipoint at 18-19; Comments of Associated Communications Corp. at 3.

⁹ See Comments of Cox Enterprises at 5; Comments of Suite 12 at 8-10; Comments of Omnipoint at 11-14; Comments of Advanced Cordless at 3-4; Comments of Rockwell International at 3; Comments of PCN America at 4-5.

rather than reward the pioneer's perseverance if other entities are able to "free ride" on its efforts. The agency can implement a policy favoring such regulatory pioneers simply and efficiently, without as great a need for comprehensive technical comparisons between competing systems, as others have claimed.¹⁰

When a pioneer blazes a regulatory trail and permits others to follow, it should be treated differently. The alternative is diminished incentives to conceive new services and to begin the lengthy process of securing the allocation, to the detriment of the public. Because the rules must retain incentives for the creation of important new communications services, the policy should be maintained.

II. CONCLUSION

The record does not provide a sound basis for the repeal of the pioneer preference rules. In fact, retention of the policy is critical to meeting the Commission's statutory mandate to promote new technologies and services.¹¹ As a result, deletion of the pioneer preference rules would violate both logic and the law. Instead of abrogation, the Commission should redouble its commitment to provide incentives to pioneers to ensure that economic free riders do not unfairly play "regulatory leapfrog."

¹⁰ See Comments of DSBC at 3.

¹¹ 47 U.S.C. § 157 (1988).

CD Radio is one such pioneer that the FCC should encourage. Grant of a preference to CD Radio will not only reward it for its commitment to DARS and the regulatory process, it will provide incentives to future pioneers, encouraging them to endure the cumbersome, costly and prolonged procedure for the creation the new services that will be used in the 21st century. The American public can only gain from such an approach.

Respectfully submitted,

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November 22, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 1993, I caused copies of the foregoing "Comments of Satellite CD Radio, Inc." to be mailed via first-class postage prepaid mail to the following:

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